



January 24, 2001

Mr. Sam Haddad
Assistant General Counsel
Open Government Section
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2001-0278

Dear Mr. Haddad:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 143496.

The Comptroller of Public Accounts (the "comptroller") received a request for information relating to taxpayers involved in the comptroller's managed audit, direct pay permit, and percentage-based reporting programs. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the representative sample of information you submitted.¹

Initially, we address your comments about the questions included in the request for information. As you correctly point out, the Public Information Act does not require a governmental body to perform legal research for a requestor or to answer general questions. *See* Open Records Decision No. 563 at 8 (1990). However, the Act does require you to make a good faith effort to relate a request for information to information that the governmental body holds. *See* Open Records Decision No. 561 at 8 (1990). As you have submitted responsive information, we assume that the comptroller has made the required good faith effort.

¹This letter ruling assumes that the representative sample of information you submitted is truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the comptroller to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Next, we address your claim under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Thus, this exception protects information that is made confidential under other statutes. In this instance, you claim that all or part of the submitted information is confidential under section 552.101 in conjunction with sections 111.006, 151.027, and 171.206 of the Tax Code.

Section 151.027(b) of the Tax Code provides that “[i]nformation secured, derived, or obtained during the course of an examination of a taxpayer’s books, records, papers, officers, or employees, including the business affairs, operations, profits, losses, and expenditures of the taxpayer, is confidential.” You indicate that some of the submitted information was obtained or derived during an examination of the records of the identified taxpayers. However, you do not identify that information. We agree that information in the submitted documents that indicates the amount of assessed deficiencies, refunds, or credits was derived from taxpayer information and is therefore confidential. *See A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 680 (Tex. 1995). However, we are unable to identify any other information that was secured, derived, or obtained by the comptroller during examinations of the taxpayers’ books, records, papers, officers, or employees. *See* Tax Code § 151.027(b); *see also id.* § 111.006(a)(2). We have marked the information that you may withhold under section 151.027(b) of the Tax Code.²

We also will address your claim under section 151.027(a) of the Tax Code with respect to the remainder of the submitted information. Section 151.027(a) provides that “[i]nformation in or derived from a record, report, or other instrument required to be furnished under this chapter is confidential and not open to public inspection[.]” Tax Code § 151.027(a). Under section 151.0231 of the Tax Code, the comptroller has the discretion to authorize a taxpayer to conduct a managed audit. A “managed audit” is defined as “a review and analysis of invoices, checks, accounting records, or other documents or information to determine a taxpayer’s liability for tax under [chapter 151 of the Tax Code].” Tax Code § 151.0231(a). In order to authorize such an audit, the comptroller must sign an agreement with the taxpayer that specifies the period to be audited and the procedure to be followed. *Id.* § 151.0231(c). Under section 151.4171 of the Tax Code, the comptroller has discretion to authorize the holder of a direct payment permit to use a percentage-based reporting method. *See* Tax Code § 151.4171(b). The term “percentage-based reporting method” is defined as “a method by which a taxpayer categorizes purchase transactions according to standards specified in the letter of authorization, reviews an agreed-on sample of invoices in that category to determine the percentage of taxable transactions, and uses that percentage to calculate the amount of tax to be reported.” *Id.* § 151.4171(a). You contend that the submitted information was required to be submitted under sections 151.0231 and 151.4171 and is therefore confidential under section 151.027(a) of the Tax Code. We disagree. While section 151.0231 requires the execution of an agreement before a managed audit can be performed, it does not require

²Based on this conclusion, we need not reach your similar claim of confidentiality under section 111.006 or 171.206 of the Tax Code.

records, reports, or other instruments to be furnished by taxpayers. Likewise, in permitting percentage-based reporting, section 151.4171 does not in and of itself require the taxpayer to provide any record, report, or other instrument. Furthermore, we cannot determine from the face of the submitted information, nor have you provided us with any information that indicates, whether any of the information that is not excepted under section 151.027(b) of the Tax Code was included in or derived from a record, report, or other instrument that was required to be furnished under chapter 151 of the Tax Code. Therefore, you may not withhold the remaining information under section 151.027(a) of the Tax Code.

You also contend that much of the remaining information is excepted from public disclosure under section 552.108 of the Government Code. Section 552.108(a)(1) of the Government Code excepts from public disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime” if “release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). The comptroller is a law enforcement agency for purposes of administering the Tax Code. *See A & T Consultants, Inc.*, 904 S.W.2d at 678-679. In *A & T Consultants*, the court agreed that the comptroller uses audits to further the comptroller’s law enforcement objectives. *Id.* Generally, a governmental body that claims an exception under section 552.108 must reasonably explain, if the information in question does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a), (b), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You state that “[a] portion of the information at issue pertains to ongoing audits and release at this time would interfere with such examinations.” You also correctly point out that interference with law enforcement generally is presumed when an investigation is open or ongoing. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 216 (1978). However, that rule applies in the traditional context in which the law enforcement agency itself, or a governmental body that intends to report or already has reported possible criminal conduct to a law enforcement agency, is conducting the investigation. It has not been applied in the unique context, such as here, where the subject of the investigation also is conducting the investigation, albeit under the management of a law enforcement agency. Under the managed audit system, the taxpayer conducts the audit subject to the examination and review of the comptroller. *See* Tax Code § 151.0231. Under percentage-based reporting, the taxpayer simply calculates the amount of tax to be reported, based on standards specified by the comptroller, and thus no “audit” as such seems to be involved. *See* Tax Code § 151.4171. Under these circumstances, we do not believe that the presumption of interference under section 552.108(a)(1) applies. Furthermore, you have failed to establish, beyond your assertion that the requested information pertains to ongoing audits, how the release of that information would interfere with the detection, investigation, or prosecution of crime. Therefore, we find that none of the remaining information is excepted from disclosure under section 552.108 of the Government Code.

In summary, some of the submitted information is confidential under section 552.101 of the Government Code in conjunction with section 151.027(b) of the Tax Code. The comptroller must withhold that information, which we have marked. The rest of the submitted information is not excepted from disclosure under either section 552.101 or section 552.108 and must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

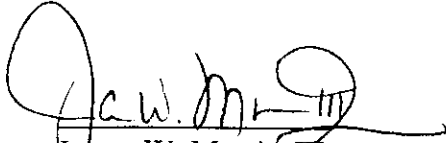
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large loop at the beginning and a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 143496

Encl: Submitted documents

cc: Mr. Harold Lee
DMA
4800 Sugar Grove Blvd., Suite 400
Stafford, Texas 77477-2627
(w/o enclosures)